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No. _____

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In The

Supreme Court of the United States

October Term, 1992

EDWIN EDWARDS, RICHARD P. IEYOUB AND HARRY CONNICK,

Petitioners,

v.

SOJOURNER T., *ET AL.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN S. BAKER, JR.*
Room 414, LSU Law Center
Baton Rouge, Louisiana 70803
(504) 388-8846

DANIEL J. BALHOFF
MATHEWS, ATKINSON, GUGLIELMO, MARKS & DAY
P.O. Box 3177
Baton Rouge, Louisiana 70821-3177
(504) 387-8352

Attorneys for Petitioner Harry Connick

*Counsel of Record

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a Louisiana criminal statute which punishes anyone (except the mother) who aborts a child in the womb, other than when the mother's life is in danger or when the mother has been raped or subjected to incest, has at least some constitutional applications and is therefore constitutional on its face.

STATEMENT NAMING ADDITIONAL PARTIES

The Petitioners are Harry Connick, District Attorney for the Parish of Orleans; Edwin Edwards, Governor of the State of Louisiana; and Richard P. Ieyoub, Attorney General for Louisiana. Petitioners Edwards and Ieyoub are filing a separate petition for certiorari.

The Respondents are Sojourner T., Jane and Ida B. on behalf of themselves and all others similarly situated; James Degueurce, M.D., Calvin Jackson, M.D., and Pamela Branning, M.D., on behalf of themselves and all others similarly situated, and their patients; Hope Medical Group for Women; Delta Women's Clinic West; Causeway Medical Suite; Emilia Bellone, M.S.W., on behalf of herself and her clients; Reverend Kathleen Korb and Rabbi Michael Matuson, on behalf of themselves and their congregants; and Dr. Ifeanyi Charles Okpalobi.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Edwin Edwards, Governor of the State of Louisiana, Richard P. Ieyoub, Attorney General of the State of Louisiana, and Harry Connick, District Attorney for the Parish of Orleans, respectfully petition this Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Sojourner T., et al v. Edwards, et al,* No. 91-3677, slip op. (5th Cir. September 22, 1992), 974 F.2d 27 (5th Cir. 1992).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 974 F.2d 27 (5th Cir.(La.),

Sep. 22, 1992). It and the judgment are reprinted in the appendix hereto, App. 1 and App. 11, respectively, *infra*.

The decision of the United States District Court for the Eastern District of Louisiana is reported at 772 F.Supp. 930 (E.D. La. 1991). It and the judgment are reprinted in the appendix hereto, App. 13 and App. 18, respectively, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4), Plaintiffs-Respondents brought this 42 U.S.C. § 1983 suit in the Eastern District of Louisiana. On August 7, 1991, the district court, pursuant to Federal Rule of Civil Procedure 12(c), granted Plaintiffs' Motion for Judgment of the Pleadings. *See* App. 13, *infra*.

Defendants-Petitioners appealed. On September 22, 1992, the Court of Appeals for the Fifth Circuit entered judgment affirming the decision of the district court. *See* App. 1-11, *infra*. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns Act 26 of the 1991 Louisiana Legislature, the Louisiana Abortion Statute, which appears at App. 20, *infra*.

The relevant portion of the Due Process Clause of the Fourteenth Amendment is "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . . " U.S., Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

On June 18, 1991, Plaintiffs Sojourner T., *et al.*, brought suit in the district court seeking declaratory and injunctive relief against the Louisiana Abortion Statute under the Due Process Clause of the Fourteenth Amendment, as interpreted by *Roe v. Wade*, 410 U.S. 113 (1973), and other constitutional theories. *Sojourner T., et al. v. Buddy Roemer, et al.*, No. 91-2247 (E.D. La. June 18, 1991) (complaint filed). On July 3, 1991, Dr. Ifeanyi Charles Okpalobi also challenged the Louisiana Abortion Statute under *Roe v. Wade* and other constitutional theories. *Okpalobi v. State of Louisiana, et al.*, No. 91-2422 (E.D. La. July 3, 1991) (complaint filed). The district court consolidated the cases.

At the request of the district judge, the parties filed cross motions for judgment on the pleadings along with supporting memoranda. On August 7, 1991, the district court granted Plaintiffs' Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c). Having determined that there were "no facts which . . . could change the legal result dictated by *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973)," App. 13, the Court declared the statute unconstitutional and enjoined its enforcement. The district court declined to reach other constitutional issues raised by Plaintiffs, "because under the *Roe* decision they cannot make any difference in the result." *See* App. 16, *infra*.

The Notice of Appeal was filed on August 8, 1991. The case was docketed August 14, 1991, in the Fifth Circuit. The case was argued and submitted on February 6, 1992 and on September 22, 1992, the Fifth Circuit affirmed the judgment of the district court, citing particularly *Planned Parenthood of Southeastern Pennsylvania, et al*

v. Casey, ___ U.S. ___, 112 S.Ct. 2791 (1992). *See* App. A, *infra*.

B. Statement of the Facts[1]

The Louisiana Abortion Statute, Act 26 of the 1991 Louisiana Legislature, App. 20-26, *infra*, was enacted over the veto of the then-governor on June 18, 1991. On the same day, Plaintiffs Sojourner T., et al., filed suit in federal district court challenging the constitutionality of the act. A second suit was later filed by Dr. Ifeanyi Charles Okpalobi which was consolidated with Sojourner's suit.

Louisiana's criminal abortion statute, which would have gone into effect on September 6, 1991, amends and reenacts LSA-R.S. 14:87. The statute makes it a crime to "administer[] or prescrib[e] any drug, potion, medicine, or any other substance to a female" or to "us[e] any specific intent of terminating a pregnancy." *See* App. 21, *infra*. It provides exceptions (1) "to preserve the life or health of the unborn child or to remove a dead unborn child;" or (2) to "save the life of the mother;" or (3) when the "pregnancy is the result of rape;" or (4) when the "pregnancy . . . is the result of incest." *See* App. 21-22, *infra*. For abortions performed under the rape and incest exceptions, certain reporting requirements are involved.

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[1] The facts of this case are those facts asserted in the Amended Complaint which are admitted in the Answer and those "well pleaded factual allegations in the adversary's pleadings." C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2nd* § 1368 (St. Paul: West Pub., 1990) ("Practice Under Rule 12(c)"). Because the district court granted the plaintiffs'-Respondents' Motion for Judgment on the Pleadings, under Rule 12(c), the well pleaded factual assertions of the Defendants'-Petitioners' Answer "are assumed to be true and all contravening assertions in the movant's [Plaintiffs'-Respondents'] pleadings are taken to be false." C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2nd* § 1368. *See also* National Metropolitan Bank v. U.S., 323 U.S. 454 (1945).

See App. 22-23, *infra*. Also, the exceptions for abortions following rape and incest apply prior to the thirteenth week from conception. *See* App. 22, *infra*. No criminal punishment can be imposed on a woman who has an abortion.

Plaintiffs-Respondents allege the following facts about themselves. Plaintiff Sojourner T. is pregnant. Plaintiff James Degueurce, M.D. performs abortions in Louisiana during the first and second trimesters of pregnancy. Plaintiff Calvin Jackson, M.D. performs abortions in Louisiana up to fifteen weeks gestational age. Plaintiff Pamela Branning, M.D. performs abortions in Louisiana. Plaintiff Hope Medical Group for Women provides abortions in Louisiana up to 22 weeks gestational age. Plaintiff Delta Women's Clinic West provides abortions in Louisiana up to 22 weeks of gestation. Plaintiff Causeway Medical Suite provides abortions in Louisiana up to 22 weeks gestational age. The medical Plaintiffs above perform abortions not falling with the exception for saving the life of the mother. Plaintiff Dr. Ifeanyi Charles Okpalobi performs abortions in Louisiana.

Governor Edwin Edwards, Attorney General Richard leyoub, and District Attorney of Orleans Harry Connick have been sued in their official capacities.

Petitioners seek review of the court of appeals' judgment that the Louisiana Abortion Statute is constitutional on its face. The lower courts have erred in not considering whether the Statute is unconstitutional in all its applications.

REASONS FOR GRANTING THE WRIT

Justice Blackmun characterized the joint opinion in *Planned Parenthood v. Casey* as "an act of personal courage." 112 S.Ct. 2791, 2844 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). More than praising the result, Justice Blackmun was paying respect to a struggle of conscience which had

occurred. That struggle was evident throughout the joint opinion, especially in the discussion of the role of the Court and the rule of law. 112 S.Ct. at 2814-16. Given the consequences for life and liberty, the internal deliberations obviously weighed heavily on the members of this Court. In repudiating a position previously regarded as a matter of fundamental principle, one or more members of the Court appeared to have engaged in some very deep soul-searching. With all of this in mind, thoughtful consideration preceded the filing of this petition in which District Attorney Harry Connick respectfully requests this Court to revisit issues raised by *Casey*, notwithstanding an understandable reluctance by some members of this Court to face the issue again so soon.

I. The Court Should Grant Review and Reverse The Court of Appeals' Decision Declaring Louisiana's Abortion Statute Unconstitutional on Its Face

A. This Case Involves Only A Facial Challenge

The decisions below were declarations of facial unconstitutionality. Numerous plaintiffs joined together to raise every conceivable challenge to the statute well before it was to become effective. The trial judge suggested that the legal issue be resolved by way of a judgment on the pleadings. 772 F.Supp. 930, 931 (E.D. La. 1991). App. 13. After the parties filed cross-motions for judgment on the pleadings, the trial judge granted the plaintiffs' motions because he "concluded that no facts which could be developed at trial could change the legal result dictated by *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973)." App. 13. The appeal, briefed and argued before but decided after *Planned Parenthood v. Casey*, declared "the Louisiana statute, on its face, is plainly unconstitutional." 974 F.2d 27, 31 (5th Cir. 1992). App. 7.

While this case resembles in many respects a case in which this Court recently denied a petition for certiorari, *Ada v. Guam Society of Obstetricians & Gynecologists*, No. 92-104 (filed Aug. 17, 1992; *cert. denied* Nov. 30, 1992; 61

U.S.L.W. 3399), the circumstances surrounding its filing were somewhat different. The respondent's opposition to the petition for certiorari in the Guam case claimed that their challenge to Guam's statute was "both on its face and as it was applied during the four days it was enforced." *Resp. Br.* at 3; see also n.11 at 9-10. In Guam the statute became effective the day it was signed by the governor, March 19, 1990. *See Ibid.* at 1. In their "Counter-statement of the Case" the respondents highlighted the total cessation of abortions on Guam for four days and the arrest of one of the attorneys for respondent for advising about abortions during that four-day period. *Ibid* at 2-3 and accompanying Apps. B, C, and D. Only after those four days did the respondents file a suit. *Ibid* at 3. In the present case, the plaintiffs filed suit long before the statute became effective. The Louisiana legislature passed the statute on June 18, 1991 in an override of the governor's veto. On the same day, the first of the plaintiffs filed suit in federal court. The law was not to become effective until September 6, 1991. Thus to the extent that the *Guam* case may have been considered an applied challenge, it differed from this case.

B. Louisiana's Criminal Abortion Statute Is Facially Constitutional Because 1) It Can at Least Be Applied to Abortions Performed After Viability for Non-Life-Saving Reasons by Physicians and to All Abortions by Non-Physicians and 2) It Exempts Many Abortions Performed Before Viability

Section one of Act 26 of the 1991 Louisiana legislature declares it "to be the public policy of the state of Louisiana that it has a legitimate compelling interest in protecting, *to the greatest extent possible,* the life of the unborn from the time of conception until birth." App. 20 (emphasis added). Therefore, the appellants are requesting this Court to uphold the challenged statute "to the greatest extent possible."

When the Fifth Circuit panel decided this case after *Casey* it should be have considered "viability". Under well-established standards for facial challenges, the plaintiffs-appellees should have been required to show that " 'no set of circumstances exists under which the Act would be valid.' " *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 524 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). See also *Rust v. Sullivan*, ___ U.S. ___, 111 S.Ct. 1759, 1767 (1991); *Ohio v. Akron Center for Reproductive Health Serv.*, 497 U.S. 502 (1990). Thus the appellate court should at least have limited its holding in a way which allowed the statute to be applied after viability and at any stage of pregnancy to non-physicians. See *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975) ("As far as this Court and the Federal Constitution are concerned, Connecticut's statute remains fully effective against performance of abortions by nonphysicians.").

Also, as suggested by the petition for certiorari in *Ada v. Guam Society of Obstetricians & Gynecologists*, a general criminal abortion statute may have *some* constitutional applications, even before viability. That is to say, "sex-selection" and "fetal farming" abortions have no conceivable relationship to the exercise of medical judgment. *See Pet. for Certiorari, Ada v. Guam Soc. of Obstetricians & Gynecologists*, No. 92-104 at 8-10 and n.9 and 10.[2] If the statute under review can be applied to prohibit such abortions, consistent with Louisiana's stated policy of "protecting, *to the greatest extent possible*, the life of the unborn," then it should be allowed to do so.

Given in addition the non-application of the statute itself to many pre-viability abortions, it becomes evident that a substantial percentage of the statute's possible

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[2] *See* also Louisiana Revised Statutes 9:121-133, the nation's first statutory treatment of *in-vitro* fertilization, which provides: "No in vitro fertilized human ovum will be farmed. . . . " LSA-R.S. 9:122.

applications are constitutional. The statute does not punish certain types of pre-viability abortions by excepting those for the life of the mother, rape, and incest. Although the rape statute has a reporting requirement which is generally limited to seven days following the rape, the exceptions actually excempt abortions for rape and incest done through the thirteenth week. Indeed, the major objection to this legislation has come from advocates of a strict prohibition who claim that, as applied in practice, abortions would be easily available through the thirteenth week of pregnancy and beyond because false claims of rape cannot be disproved and because proving fetal age can be most difficult. While the draftsmen of the statute certainly desired as restrictive a statute as they thought would meet legislative and constitutional approval, practical problems of proof severely impede the effectiveness of drawing lines during pregnancy as discussed in Part II.

II. The Court Should Review This Case in Order to Rule on the Issue of Viability in the Context of a Criminal Case

The Joint Opinion in *Casey* devoted relatively little discussion to the concept of viability. See 112 S.Ct. at 2817-18. Even that little bit of discussion was technically *dicta* because none of the challenged provisions drew the matter of viability into question. Not surprisingly, therefore, the attorneys barely mentioned viability in the briefs filed in *Casey*.[3] Neither in *Casey* no *Roe*[4] has the Court had

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[3] Only two sentences in the Pennsylvania Attorney General's brief of almost 120 pages even refer to viability and these point out that it is an arbitrary concept. Brief for Respondents in Casey at p. 111. The Petitioner's brief of 62 pages contains just one paragraph with five sentences. Brief for Petitioner at pp. 28-29.

[4] In *Roe*, neither party briefed or argued the concept of viability as a logical point at which to find the State's interest in

the benefit of adequate briefing on the matter of whether viability represents a meaningful point at which to draw a line during pregnancy on the question of abortion.

Even if unwilling to reconsider viability as a constitutional standard *per se* in abortion cases, the Court should consider the additional questions raised by a viability standard in the context of the present criminal statute. The criminal prosecution of abortion involves difficulties which can be adequately addressed only within the framework of a criminal statute – something which the Court has not done since *Roe*.

A. *Casey* Should be Read in Such a Way That in a Criminal Case the State Is Required Not to Prove Viability, But Only to Allow The Defendant to Raise Non-Viability as an Affirmative Defense

As one actually responsible for the prosecution of criminal cases, petitioner Harry Connick asserts that he should be able to prosecute a post-viability abortion under the current criminal abortion statute even though it does not mention the word "viability" and thus would not require him to bear the burden of proof on viability. Petitioner Connick further contends that *Casey* should be satisfied if the defendant is given the opportunity to raise as a defense and prove (either to the Court or the Jury, as this Court deems appropriate) that the abortion he performed or intended to perform was not on a viable child. The petitioner takes this position because 1) although this and other criminal abortion statutes have not required proof of an actual miscarriage, a miscarriage would be

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protecting prenatal life "compelling." Appellant specifically disavowed reliance on any point during pregnancy beyond which abortion could be prohibited and relied, instead, on birth as the proper dividing line. *Roe* at 153. The State argued that its interest was compelling from conception forward, *Roe*, 410 U.S. at 156.

necessary in order for the prosecution as a practical matter to prove viability; and 2) doctors who actually perform abortions know best whether a particular unborn child is viable.

1. Louisiana's current criminal abortion statute, like previous ones in Louisiana and the nation generally prior to *Roe*, is drafted as an inchoate crime. As such it is actually a form of criminal attempt. See R. Perkins, *Criminal Law* (2d ed., 1969) at 141.[5] Such statutes do not require proof that a miscarriage *actually* occurred. *Ibid.*

This inchoate form of criminal abortion statute retains an important usefulness. With developments in medical science and technology, theoretically there may be no need to have an abortion statute as opposed to a fetal homicide statute. Twenty-one states currently make killing an unborn child homicide. *See* App. F which lists and categorizes the states according to their statutes and case-law. Nevertheless, abortion differs factually from fetal homicide due to the woman's consent which in turn produces problems of proof. The woman's consent makes proving the *corpus delicti* for homicide of an unborn child

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[5] The tendency of modern legislation has been to emphasize the unauthorized operation or administration. . . . [T]he offense created by such a statute is more properly called an "attempt to procure an abortion" than an "abortion," so far as the literal meaning of the word is concerned; but it is thought of as an unlawful act with a certain intent rather than as an attempt – and this no doubt explains the tendency to apply the word "abortion" to the unlawful operation or administration itself. Under such a statute the operation or administration, with the forbidden intent, is regarded as a completed offense, – not as merely part of something else. *If a miscarriage results this may be important as a matter of evidence, but it adds nothing to the crime itself.*

R. Perkins, *Criminal Law* (2d ed. Mineola; Foundation Press 1969) at 141. (emphasis added, footnotes omitted).

difficult in many, if not most, abortion cases. The mother's cooperation with the physician impedes recovery of the aborted child. The earlier in pregnancy an abortion occurs, the smaller will be the size of the child. Moreover, the methods available to perform early abortions, e.g., suction abortion, make recovery of the body even more problematic. While not absolutely essential, recovery of the body certainly facilitates proof of the *corpus delicti* of homicide. *See* W. LaFave and A. Scott, *Criminal Law* (St. Paul: West Pub., 2d ed. 1986) at 18. Where, however, a pregnant woman has been battered without her consent, proving the *corpus delicti* of homicide does not pose the same problems.

If states are now constitutionally required to include some form of the word "viability" in the essential elements of the crime of abortion, then "viability" becomes an element to be proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979). Whether a state criminal abortion statute requires a) only certain acts which are accompanied by the intent to abort a viable child or b) also proof that a viable child was actually aborted, the statute will necessitate proof about the fetal age. As a practical matter even if the statute required only "a", the inchoate form, the prosecution would have to be able to produce evidence of a viable fetus in order to bear the burden of proving the intent to abort a viable fetus. In other words, the required inclusion of the term "viability" can effectively defeat the application even to post-viability abortions of an inchoate form of abortion statute such as Louisiana's.

2. In order to allow Louisiana's criminal abortion statute to apply to post-viability abortions, *Casey* should be interpreted to require only that the defendant be able to raise non-viability by way of an affirmative defense. First, the doctor performing an abortion has the best available information about whether the particular child is viable. As related in the statement of facts, some of the physician-respondents allege that they perform abortions

(only) prior to 22 weeks. *See* p. 5, *supra*. In the area of criminal law this Court has recognized that Due Process does not prevent putting the burden of proof on the defendant for affirmative defenses. *Patterson v. New York*, 432 U.S. 197 (1977); *Martin v. Ohio*, 480 U.S. 228 (1987). See also *Medina v. California*, ___ U.S. ___, 112 S.Ct. 2572 (1992).

Second, as a result of *Colautti v. Franklin*, 439 U.S. 379 (1979), substantial uncertainty exists about the State's ability to prove viability – at least in a criminal case. On the one hand, *Webster* upholds a viability-test provision in a regulatory statute by a plurality which purported to narrow *Colautti* and a concurrence which found the requirement consistent with *Colautti*. 492 U.S. at 529 (O'Connor, J., concurring). The concurrence in *Webster* quotes and endorses this important statement in *Colautti*:

> Because this point [of viability] may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability – be it weeks or gestation or fetal weight or any other single factor – as the determinant of when the State has a compelling interest in the life or health of the fetus. Viability is the critical point. Id., at 388-389, 99 S Ct 675.

492 U.S. at 529 (O'Connor, J., concurring).

There is a great difference between a regulation concerned with requiring (in the present and future) a doctor to perform tests to determine viability, see *Webster*, and a criminal prosecution for a past act which must be proven beyond a reasonable doubt before subjecting the defendant to substantial potential punishment. If the state must bear the burden of proving viability, almost necessarily the State will have to recover an aborted child because, as *Colautti* stated, proof of viability is a case-by-case matter.

If a majority of the Court intends that states actually be able to enforce criminal abortion statutes after viability, it should clarify that a state prosecution can proceed under a statute which as a matter of state substantive law does not require the prosecutor to bear the burden of proof on viability. Thus, prosecutors in Louisiana who publicly declare that they are enforcing the current statute against post-viability abortions should not be required to bear the burden of proving viability. The Court should clarify in this case that *Casey* simply requires that a defendant-physician be allowed to raise the affirmative defense of non-viability.

B. The Reason Louisiana Should be Able to Put the Burden of Proving an Affirmative Defense of Non-Viability on the Physician Is That States Retain the General Authority to Define Criminality and to Protect Human Life.

The references in *Roe* and *Casey* to "potential life" and viability assume at least uncertainty about the actuality of life in the womb. Yet criminal statutes punishing the killing of unborn children not consented to by the mother protect actual human life in the womb. *See* App. F. An essential element in the proof of every criminal homicide is that a "human being" has died. As accurately stated in *Roe* the common law draws the line at birth. 410 U.S. at 161. Contrary to inference drawn therefrom in *Roe*, *Id.* at 161-162, however, that line does not imply a denial that life existed before birth. Rather, the common-law rule involves criminal law issues of mental element and the cause of death. *See* J. Noonan, *A Private Choice* (N.Y.C.: Free Press, 1979) at 132, 134, 140-41 (hereafter "Noonan"). Since before *Roe*, advances in scientific knowledge have eliminated the reasons for the evidentiary-based common law rules about birth and resulted in an expansion of statutes treating the killing of an unborn child as homicide. *See* App. 27-29. The impetus for changing the common law rules about unborn human life has come not in

abortion cases but in cases of assault on pregnant women who lose the child they are carrying. See Noonan at 141. This evolution in the law represents a natural, fact-oriented change from the common-law rule which distinguished in terms of whether the child was stillborn or was born alive and then died. *Id.*[6] But for the abortion controversy, courts on their own without legislation would have taken greater account of development in scientific understanding and might well have completely eliminated the common law distinctions tied to birth.[7]

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[6] Under the common law if the child is stillborn, the assault and battery did not result in a criminal homicide. If however the child is born and breathes or otherwise establishes independent circulation and then dies, the perpetrator could be convicted of criminal homicide. Based on the different results in the two situations, judges have generally concluded the common law did not consider the fetus to be a person or human being until born alive. *See Keeler v. Superior Court*, 470 P.2d at 622 (Cal. 1970). The principle underlying common law distinction between the two situations, however, should lead to the exact opposite conclusion. If the fetus is not a human being when wounded in the womb, the perpetrator has not inflicted an injury against a human being and therefore the common law should not have – but did – allow a conviction for murder when the child survived until after birth.

[7] In the 1947 case of *People v. Chavez*, 77 Cal. App. 2d 621, 176 P.2d 92 (1947), a California court altered the common law in the light of modern medical knowledge by holding:

> [A] viable child in the process of being born is a human being born within the meaning of the homicide statutes, whether or not the process is fully completed. It should at least be considered a human being where it is a living baby and where in the natural course of events a birth which is already started would naturally be completed.

Id. at 94. In the 1970 case of *Keeler v. Superior Court of Amador County*, 470 P.2d 617 (Cal. 1970), which became the leading case, the California Supreme Court however declined to find a child before birth to be a "human being" in a case of a delivered stillborn. Relying on a revisionist law article later cited in *Roe v. Wade* (C. Means, "The Law

By recognizing the unborn child as a human being or person in fetal homicide cases, states do adopt a theory of life. Moreover, nothing in *Roe* prohibits the states from doing so. *See Webster v. Reproductive Health Services*, 492 U.S. 490, 506 (1989). *Roe* only stops states from overriding the woman's right of privacy. As a result, a state can protect an unborn child human being *except when* the mother decides to have an abortion sanctioned by *Roe*.

Certainly, to say that the unborn child is a human being except when the mother decides she does not want to bear the child makes no sense. Its existence as a human being cannot depend on whether an attacker injures the child while battering the mother or a licensed physician assaults the child with the mother's consent. At any given point, either a human being exists or does not exist. At a minimum, it would be more candid of the Court, as well as consistent with principles of criminal law, to admit that what *Roe* and *Casey* do is to provide an affirmitive federal defense to abortion. In other words, *Roe* and *Casey* simply mean that even if abortion involves the taking of a life, the taking of that life is protected when done by a licensed physician acting with the woman's consent prior to viability.

The law may make generous use of fictions, but states are not simply indulging fantasies by labeling the fetus a human being or including the fetus within the coverage of homicide statutes. More than labeling is at stake. A defendant is being adjudged guilty of criminal homicide. Unless the word homicide has lost its meaning, a jury must find beyond a reasonable doubt that at the time of the crime a human being existed. Using the word "fetus" in a homicide statute or labelling a status feticide does not avoid the problem because the term fetus refers

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of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality," 14 *N.Y.L.F.* 411 (1968)), the majority's attitude toward new medical data was clearly colored by the abortion controversy.

to an unborn child. *Black's Law Dictionary* (6th ed. 1990) at 621. Otherwise, homicide statutes could be enacted which include dogs, pigs or other animals not part of the human species. To punish someone for any crime, much less criminal homicide, clearly violates due process unless the State has proven all these elements of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970); *Jackson v. Virginia*, 443 U.S. 307 (1979).

Despite *Roe*, indeed in the wake of *Roe*, the law has increasingly come to recognize and protect **actual**, not merely "potential", human life before birth. For actual life, viability is not necessarily a prerequisite for criminal law protection by the State. The Court therefore should use the instant Louisiana statute to make it clear to lower courts that because states decide basic issues of unlawfulness and criminality, states may use criminal abortion statutes to protect what they reasonably consider to be **actual human life**.

CONCLUSION

Petitioner respectfully requests that the petition for a writ of *certiorari* to the United States Court of Appeals for the Fifth Circuit be granted in order to resolve these important federal questions.

Respectfully submitted

JOHN S. BAKER, JR.*
Room 414, LSU Law Center
Baton Rouge, Louisiana 70803
(504) 388-8846

DANIEL J. BALHOFF
MATHEWS, ATKINSON, GUGLIELMO, MARKS & DAY
P. O. Box 3177
Baton Rouge, Louisiana 70821-3177
(504) 387-8352

Attorneys for Petitioner, Harry Connick

*Counsel of Record

December 21, 1992

APPENDICES

A. Opinion of the Fifth Circuit .....App. 1

B. Judgment of the Fifth Circuit .....App. 11

C. Opinion of the District Court .....App. 13

D. Judgment of the District Court .....App. 18

E. Act 26 of the 1991 Louisiana Legislature ...App. 20

F. List of States that Treat the Killing of an Unborn as Homicide .....App. 27

APPENDIX A

SOJOURNER T, on Behalf of Herself and All Others Similarly Situated, et al., Plaintiffs-Appellees,

v.

Edwin W. EDWARDS, As Governor of the State of Louisiana, et al., Defendants-Appellants.

Dr. Ifeanyi Charles OKPALOBI, Plaintiff-Appellee,

v.

Richard P. IEYOUB, Attorney General of the State of Louisiana, et al., Defendants-Appellants.

No. 91-3677.

United States Court of Appeals, Fifth Circuit.

Sept. 22, 1992.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JOLLY, and EMILIO M. GARZA, Circuit Judges, and SHAW, District Judge.*

E. GRADY JOLLY, Circuit Judge:

This suit challenges the Louisiana Abortion Statute, which criminalizes performing abortions except under very limited circumstances. In the district court, the

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* Chief Judge of the United States District Court of the Western District of Louisiana, sitting by designation.

plaintiffs argued that the Statute is preempted by federal law, that the Statute is unconstitutional under *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), that the Statute is unconstitutional under *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and that the Statute is void for vagueness. The state of Louisiana defended the Statute arguing that *Roe v. Wade* has been overruled *sub silentio* by *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), and its progeny. The district court struck down the Statute, holding that because *Roe v. Wade* is still good law, the Statue is unconstitutional.

The same arguments are presented to us that we made in the district court. After this case was argued before us, the Supreme Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), reaffirmed the essential holding of *Roe v. Wade*. Because the Louisiana statute is clearly unconstitutional under *Casey*, we affirm the district court's order.

I

Sojourner T., et al., brought this suit in federal district court challenging the Louisiana Abortion Statute. They argued that the statute is preempted by the Food, Drug and Cosmetic Act[1] and by FDA regulations approving the use of certain contraceptives. They also argued that the statute violates the Commerce Clause and that it is

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[1] 21 U.S.C. § 360K (1988).

unconstitutional under *Roe v. Wade* and *Griswold v. Connecticut*. They requested declaratory and injunctive relief.

Dr. Okpalobi, also seeking declaratory and injunctive relief, challenged the Louisiana statute on vagueness grounds. The district court consolidated these two cases.

Motions for judgment on the pleadings and supporting memoranda were filed by all parties. Pursuant to Fed.R.Civ.P. 12(c), the district court granted the plaintiffs' motion for judgment on the pleadings on the grounds that under *Roe v. Wade*, the Louisiana Abortion Statute is unconstitutional. 772 F.Supp. 930. The state appeals.

II

The Louisiana Abortion Statute was passed on June 18, 1991.[2] It amends and reenacts LSA-R.S. 14:87. The Statute makes it a crime to "administer[] or prescrib[e] any drug, potion, medicine, or any other substance to a female" or to "us[e] any instrumental or external force whatsoever on a female" "with the specific intent of terminating a pregnancy." The Statute provides exceptions when: (1) the physician terminates the pregnancy in order to preserve the life or health of the unborn baby or to remove a dead unborn child; (2) the physician terminates the pregnancy to save the life of the mother; (3) pregnancy is the result of rape; and (4) pregnancy is the result of incest. Before an abortion can be performed under the rape and incest exceptions, certain reporting requirements must be met. For example, the victims must

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[2] 1991 La. Acts 26.

report the rape or incest to law enforcement officials. Also, abortions performed on rape and incest victims must be performed within the first thirteen weeks of pregnancy.

No criminal liability attaches to a woman seeking or procuring an abortion.

III

In urging us to uphold the Statute, the state concedes that *Roe v. Wade* has not been expressly overruled. Instead, the state argues that *Roe* has been overruled *sub silentio* by *Webster* and its progeny.

On the other hand, Sojourner, et al., argue that we should avoid deciding this case on constitutional grounds. Instead, we should affirm the district court on the grounds that the Statute is preempted by FDA regulations and by the Food, Drug and Cosmetic Act. They also present alternative arguments: we should affirm the district court on the grounds that the Statute violates the Commerce Clause, on the grounds that the Statute is unconstitutional under *Griswold*, or on the grounds that the Statute is unconstitutional under *Roe*. Their argument that the Statute is preempted by federal law, that the Statute violates the Commerce Clause, and that the statute is unconstitutional under *Griswold* is contingent on their particular reading of the Statute. They argue that the Statute criminalizes the use of contraceptives in Louisiana that act after conception. They argue that if we entertain doubts about this construction of the Statute, we should, before reaching the other issues in this case, certify to the Louisiana Supreme Court the question of

whether the Statute criminalizes the use of certain contraceptives.

Dr. Okpalobi argues that the Statute is unconstitutionally vague. His vagueness argument emphasizes the elusiveness of the definitions of the rape and incest exceptions. He also argues that this court should certify to the Louisiana Supreme Court the question of whether the Act violates the right to privacy guaranteed by Article 1, Section 5 of the Louisiana Constitution.

IV

Below, the plaintiffs challenged the facial validity of the Statute. Thus, we must determine whether the plaintiffs are correct that the Statute cannot be construed and applied without infringing upon constitutionally protected rights. *Rust v. Sullivan*, ___ U.S. ___, ___, 111 S.Ct. 1759, 1767, 114 L.Ed.2d 233 (1991). The district court found that *Roe v. Wade* is still good law and that the Louisiana Abortion Statute clearly transgresses those constitutional rights, as enunciated in *Roe v. Wade*, of women who seek an abortion.

The Supreme Court recently reaffirmed the essential holding of *Roe v. Wade* in *Casey*. *Casey*, ___ U.S. at ___, 112 S.Ct. at 2803. In *Casey*, the Court held that a woman has a right to choose to have an abortion before viability and that legislation restricting abortions before viability must not place an undue burden on that right. *Id.* "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at ___, 112 S.Ct. at 2821. The Court

held that before viability, a State's interests are not strong enough to support a prohibition of abortion. *Id.* at ___, 112 S.Ct. at 2804. Thus, the Louisiana statute is clearly unconstitutional under *Casey*.

V

Sojourner, et al., urge us to avoid deciding this case on constitutional grounds and to affirm the district court on the grounds that the Statute is preempted by FDA regulations and the Food, Drug and Cosmetic Act, arguing that we must, when possible, decide a case on statutory rather than constitutional grounds. We can, of course, affirm the district court's judgment on any grounds supported by the record. *Mangaroo v. Nelson*, 864 F.2d 1202, 1204 n. 2 (5th Cir.1989). Furthermore, we acknowledge that it is usually true that if a case can be decided either on statutory or constitutional law, we should address the statutory issue first. *Harris v. McRae*, 448 U.S. 297, 306-307, 100 S.Ct. 2671, 2682-2683, 65 L.Ed.2d 784 (1980). We do not think, however, that the facts and the procedural posture of this case warrant the application of this jurisprudential principle. The plaintiffs brought a facial challenge to the constitutionality of the Statute. The district court entered a judgment on the pleadings on the grounds that the Statute was unconstitutional under *Roe v. Wade*. It did not address the preemption issue. There was no trial or hearing to develop the record with respect to the several crucial factual and legal issues that underlie the preemption arguments, including whether certain contraceptives act after contraception, and if so, whether the Statute criminalizes the use of these contraceptives. Additionally, we are not applying a

new interpretation of the Constitution to decide this case; we are only applying the clear holding of *Casey*. Therefore, the facts and posture of this case do not obligate us to reach the statutory issue first.[3]

Similarly, Dr. Okpalobi urges us to avoid deciding the case on federal constitutional grounds by certifying the question to the Louisiana Supreme Court whether, because it invades the right of privacy, the Statute is unconstitutional under the Article 1, Section 5 of the Louisiana Constitution. Because Dr. Okpalobi raises this issue for the first time on appeal, we do not address it. *Honeycutt v. Long*, 861 F.2d 1346, 1352 (5th Cir.1988). Planned Parenthood of Louisiana, as amicus curiae, argues that we should abstain from deciding this case because there is a pending state court challenge to the Statute under the Louisiana Constitution.[4] This argument was also raised for the first time on appeal, and we therefore do not address it. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 840 n. 13 (5th Cir.1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).

VI

In conclusion, we hold that the Louisiana statute, on its face, is plainly unconstitutional under *Casey* because

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[3] Since we decide this case on the grounds that the Statute is unconstitutional under *Casey*, Sojourner's motion to certify the question of whether the Louisiana Abortion Statute criminalizes the use of certain contraceptives is denied.

[4] Apparently, the state court action was stayed pending the outcome of this suit.

the statute imposes an undue burden on women seeking an abortion before viability.[5] The order of the district court is therefore.

AFFIRMED.

EMILIO M. GARZA, Circuit Judge, concurring specially:

I agree with Judge Jolly that "the Supreme Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, . . . reaffirmed the essential holding of *Roe v. Wade*"[1] and that "the Louisiana [Abortion] Statute is clearly unconstitutional under *Casey*."[2] *See Planned Parenthood v. Casey*, ___ U.S. ___, ___, 112 S.Ct. 2791, 2804, 120 L.Ed.2d 674 (1992) ("After considering the fundamental constitutional question resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* [that a woman has the right to terminate her pregnancy before viability] should be retained and once again reaffirmed."). Accordingly, I concur in Judge Jolly's opinion.

Casey, nonetheless, causes me concern. "The issue is whether [abortion] is a liberty protected by the Constitution of the United States." *Id.*, ___ U.S. ___, 112 S.Ct. at 2874 (Scalia, J., dissenting). Two essential facts seem

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[5] Because we decide the case on the grounds that the Statute is unconstitutional under *Casey*, we do not reach the appellees' arguments that the Statute violates the Commerce Clause, that the Statute is unconstitutional under *Griswold*, or that the Statute is unconstitutionally vague.

[1] 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

[2] Slip op. at ___.

apparent: "[T]he Constitution says absolutely nothing about [abortion], and . . . the longstanding traditions of American Society have permitted [abortion] to be legally proscribed."[3] *Id.* (footnote omitted) (citation omitted). *Casey* "decorate[s] a value judgment[4] and conceal[s] a

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[3] *Compare Roe,* 410 U.S. at 138-42, 93 S.Ct. at 719-21 (historical review of abortion laws in America) *with Michael H. v. Gerald D.,* 491 U.S. 110, 121-28, 109 S.Ct. 2333, 2341-44, 105 L.Ed.2d 91 (1989) (overview of presumption of illegitimacy) *and Bowers v. Hardwick,* 478 U.S. 186, 191-95, 106 S.Ct. 2841, 2844-46, 92 L.Ed.2d 140 (1986) (brief history and list of sodomy laws in America).

[4] The joint opinion states: "Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest." *Casey,* ___ U.S. at ___, 112 S.Ct. at 2806. I do not agree with the joint opinion's articulation of the issue. First, States legislate morality every day in the form of criminal statutes. For example, "[a] person commits an offense if he . . . intentionally or knowingly causes the death of an individual," *see* Tex.Pen.Code Ann. § 19.02 (West 1992), is the legal formulation of the commandment: "Thou shall not kill." *See Bowers v. Hardwick,* 478 U.S. at 196, 106 S.Ct. at 2846 ("the law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts [would] be very busy indeed.").

Second, the underlying constitutional issue is not "whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter," but whether States have the constitutional power to make this ontological choice. For example, States choose for ontological reasons, to protect the lives of their citizens. In this instance, "liberty" gives way to protection of human life. *See Casey,* ___

political choice." *Id.* at ___, 112 S.Ct. at 2875. If this assessment is correct, the Court's reaffirmance – whether viewed as a good or bad result – has accelerated the Court "towards systematically eliminating checks upon its own power; and [at least with *Roe* and *Casey*] it [has] succumb[ed] [to this temptation]". *Id.* at ___, 112 S.Ct. at 2874.

Because the decision to permit or proscribe abortion is a political choice, I would allow the people of the State of Louisiana to decide this issue for themselves.[5] Nonetheless, I acknowledge that *Casey* controls, and therefore, I concur.

U.S. at ___, 112 S.Ct. at 2859 (Rehnquist, C.J., dissenting) ("To look 'at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body.' " (quoting *Michael H. v. Gerald D.*, 491 U.S. at 124 n. 4, 109 S.Ct. at 2342 n. 4)). The ultimate question – if one accepts the joint opinion's view that viability is critical – is whether States have the constitutional authority to decide for themselves whether viability makes an ontological difference.

[5] *See Michael H.*, 491 U.S. at 122, 109 S.Ct. at 2341 ("Whenever the Judiciary [realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, strikes down legislation adopted by a State], it unavoidably preempts for itself another part of the governance of the country without express constitutional authority." (quoting *Moore v. East Cleveland*, 431 U.S. 494, 544, 97 S.Ct. 1932, 1958, 52 L.Ed.2d 531 (1977))).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-3677

D.C. Docket No. CA-91-2247-H &
CA-91-2422-H

(Filed Sept. 22, 1992)

SOJOURNER T, on Behalf of Herself
and All Others Similarly Situated, ET AL.,

Plaintiffs-Appellee,

versus

EDWIN W. EDWARDS, As Governor of the
State of Louisiana, ET AL.,

Defendants-Appellants

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DR. IFEANYI CHARLES OKPALOBI,

Plaintiff-Appellee,

versus

RICHARD P. IEYOUB, Attorney General of
the State of Louisiana, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for
the Eastern District of Louisiana

Before JOLLY, and EMILIO M. GARZA, Circuit Judges, and SHAW, District Judge.[1]

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

September 22, 1992

ISSUED AS MANDATE: OCT 14 1992

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[1] Chief Judge of the United States District Court of the Western District of Louisiana, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SOJOURNER, T., et al

VS.

BUDDY ROEMER, AS GOVERNOR OF THE STATE OF LOUISIANA, ET AL SECTION "H"

CONSOLIDATED WITH

DR. IFEANYI CHAS. OKPALOBI

VERSUS NO. 91-2422

STATE OF LOUISIANA, ET AL SECTION "H"

REASONS FOR JUDGMENT

(Filed Aug. 7, 1991)

When the pleadings demonstrate that there is no factual issue which could change the result, any party may move for judgment on the pleadings. Fed. R. Civ. P. 12(c). At my first meeting with counsel on the day after the first of these two consolidated actions was filed, I suggested that this case would meet that test. After consideration of motions for judgment on the pleadings and extensive supporting memoranda filed by all of the parties, I have concluded that no facts which could be developed at a trial could change the legal result dictated by *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973). Therefore, for the following reasons, the motions for judgment on the pleadings filed by plaintiffs are granted, and judgment will be entered declaring Act 26 of the 1991 Louisiana Legislature unconstitutional and enjoining its enforcement.

Justice White's dissenting opinion in *Roe v. Wade*, 410 U.S. at 222-23, 93 S. Ct. at 763, includes the following statement, with which I wholeheartedly agree:

> The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand.

However, the majority opinion in *Roe*, not Justice White's dissent, is still the law of this land. The Constitution of the United States means what the Supreme Court states what it means at any given time. Just two yeas ago, in *Webster v. Reproductive Health Services*, the appellants and the United States Department of Justice as *Amicus Curiae* urged the Court to overrule *Roe*; Justice Scalia in his concurring opinion did likewise. The Court declined to do so. I quote from the Chief Justice's opinion: "This case therefore affords us no occasion to revisit the holding of *Roe*, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause, *id.* at 164, and we leave it undisturbed." *Webster v. Reproductive Health Services*, 492 U.S. 490, 521, 109 S. Ct. 3040, 3058 (1989). The Court has still not revisited *Roe*.

The Texas statute held unconstitutional in *Roe* is in all pertinent respects identical to the Louisiana statute under attack here. Thus *Roe* in effect declares the Louisiana statute unconstitutional. Even though the Supreme Court has thus far explicitly refused to overrule *Roe*, counsel for defendants urge that I should anticipate that it will now do so. The Supreme Court has repeatedly held that I have no such authority:

> Needless to say, only this Court may overrule one of its precedents. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535, 103 S. Ct. 1343, 1344, 75 L. Ed. 2d 260 (1983).

> . . . unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower courts, no matter how misguided the judges of those courts may think it to be. *Hutto v. Davis*, 454 U.S. 370, 375 (1981).

Defendants contend that a decision upholding the constitutionality of the Louisiana statute under attack would not amount to the overruling of *Roe*. They argue that *Webster* and two later Supreme Court decisions[1] have effectively overruled *Roe, sub silentio*. There are persuasive authorities cited in support of the right (arguably, the duty) of a lower court to decline to apply Supreme Court precedent when the Court in later decisions has itself *de facto* overruled that precedent, although not expressly. The temptation to apply that principle is great, especially when I agree with the result which would follow. But I

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[1] *Hodgson v. Minnesota*, ___ U.S. ___, 110 S. Ct. 2926 (1990); *Ohio v. Akron Center for Reproductive Health*, ___ U.S. ___, 110 S. Ct. 2972 (1990).

cannot conclude that *Roe* has been overruled by implication in the face of an explicit refusal in *Webster* to overrule it expressly. A lower court cannot decide that a Supreme Court decision has been overruled *de facto* when in three cases in the past two years the Supreme Court has declined the opportunity to overrule that decision *de jure*. No one could seriously argue that in cases after *Roe* the Court has acted *sub silentio*[2] as to the *Roe* decision.

Every judge in the United States takes an oath to uphold the Constitution as it is interpreted by the U.S. Supreme Court. No judge in the United States enjoys the luxury of applying his or her own interpretation of the U.S. Constitution with respect to an issue which the United States Supreme Court has previously decided. No judge in the United States can overrule *Roe v. Wade;* only the Supreme Court can do so.

Other issues are raised by the pleadings and in memoranda. I do not consider them, because under the *Roe* decision they cannot make any difference in the result. I recognize that if the Supreme Court overrules *Roe v. Wade,* one or more of these issues may have to be considered on remand.

It matters not what my personal opinion may be as to whether the United States Constitution nullifies the action of elected state legislators in prohibiting abortions under certain circumstances. I am bound by my oath of office to decide that under the existing Supreme Court

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[2] Sub silentio. Under silence; without any notice being taken. Black's Law Dictionary 1428 (6th ed. 1991).

interpretation, the Louisiana statute under attack is unconstitutional.

Disposition of claims for attorney's fees is deferred until the conclusion of the litigation.

8/7/91
/s/ A. Duplantier
Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SOJOURNER, T., et al	CIVIL ACTION
VERSUS	NO. 91-2247
BUDDY ROEMER, AS GOVERNOR OF THE STATE OF LOUISIANA, ET AL	SECTION "H"

CONSOLIDATED WITH

DR. IFEANYI CHAS. OKPALOBI	CIVIL ACTION
VERSUS	NO. 91-2422
STATE OF LOUISIANA, ET AL	SECTION "H"

JUDGMENT

(Filed Aug 7, 1991)

Considering the court's Reasons for Judgment filed in the record this date, and further considering the court's direction as to entry of judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiffs and against defendants, declaring Act 26 of the 1991 Louisiana Legislature unconstitutional and enjoining defendants from enforcing said statute.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the disposition of the claims for attorney's fees is hereby deferred until the conclusion of the litigation.

New Orleans, Louisiana, this 7th day of August, 1991.

/s/ A. Duplantier
UNITED STATES DISTRICT JUDGE

APPENDIX E

Regular Session, 1991

HOUSE BILL NO. 112

BY REPRESENTATIVE SAM THERIOT, SENATOR BARES, REPRESENTATIVES DIMOS, LANCASTER, LABORDE, SITTIG, HIGGINBOTHAM, ACCARDO, ACKAL, DIEZ, DONELON, GLOVER, GUIDRY, HAIK, HERRING, LEBLANC, LEMOINE, MARTIN, STELLY, AND STINE AND SENATORS MCPHERSON, PICARD, CRAIN, SAUNDERS, BRINKHAUS, AND POSTON

AN ACT

To amend an reenact R.S. 14:87, relative to abortion; to define and prohibit abortions; to provide for exceptions; to provide for penalties; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Legislative findings and purpose. Life begins at conception.

It is declared to be the public policy of the state of Louisiana that it has a legitimate compelling interest in protecting, to the greatest extent possible, the life of the unborn from the time of conception until birth. We also affirm our belief that life begins at conception and that life thereafter is a continuum until the time of death.

In furtherance of this compelling interest we declare it to be a reasonable and proper exercise of the police power of the state to prohibit and otherwise reasonably

regulate, through the imposition of criminal penalties, the performance of abortions.

Section 2. R.S. 14:87 is hereby amended and reenacted to read as follows:

§87. Abortion

A.(1) Abortion is the performance of any of the following acts, with the specific intent of terminating a pregnancy:

(a) Administering or prescribing any drug, potion, medicine, or any other substance to a female; or

(b) Using any instrument or external force whatsoever on a female.

(2) This Section shall not apply to the female who has an abortion.

B. It shall not be unlawful for a physician to perform any of the acts described in Subsection A of this Section if performed under the following circumstances:

(1) The physician terminates the pregnancy in order to preserve the life or health of the unborn child or to remove a dead unborn child.

(2) The physician terminates a pregnancy for the express purpose of saving the life of the mother.

(3) The physician terminates a pregnancy which is the result of rape as defined in either R.S. 14:42, R.S. 14:42.1, or R.S. 14:43 and in which all of the following requirements are met prior to the pregnancy termination:

(a) The rape victim obtains a physical examination and/or treatment from a physician other than the physician who is to terminate the pregnancy within five days of the rape to determine whether she was pregnant prior to the rape and to prevent pregnancy and venereal disease, unless the rape victim is incapacitated to such a degree that she is unable to obtain this examination. If the victim is unable to obtain the examination due to such incapacity, then an examination shall be performed within five days after the incapacity is removed; and

(b) The rape victim reports the rape to law enforcement officials within seven days of the rape unless the victim is incapacitated to such a degree that she is unable to report the rape. If the victim is unable to report the rape due to such incapacity, then a report shall be made within seven days after the incapacity is removed; and

(c) The abortion is performed within thirteen weeks of conception.

(4) The physician terminates a pregnancy which is the result of incest as defined in R.S. 14:78, provided the crime is reported to law enforcement officials and the abortion is performed within thirteen weeks of conception.

C.(1) Prior to the performance of any abortion under Subsection (B)(3) or (B)(4) of this Section, the physician who is to perform the abortion shall obtain from the victim a statement in writing verifying that she has obtained the physical examination and shall obtain written verification by a law enforcement official that the victim reported the rape to law enforcement officials as required under this Section.

(2) Every physician who conducts a physical examination of a rape victim within five days of the rape shall immediately, upon written request of either the victim or the physician who is to perform the abortion on the victim, provide to the victim or the requesting physician written verification of his examination.

(3) Every law enforcement official who receives a report of a rape victim within seven days of the rape or receives a report of incest shall immediately, upon written request of either the victim or the physician who is to perform the abortion, provide to the victim or requesting physician written verification of the report which was made to the official.

D. As used in this Section, the following words and phrases are defined as follows:

(1) "Law enforcement official or officer" means any peace officer or agency empowered to enforce the law in criminal matters within his or its respective jurisdiction, including but not limited to a state police officer, sheriff, constable, local police officer, and district attorney.

(2) "Physician" means any person licensed to practice medicine in this state.

(3) "Unborn child" means the unborn offspring of human beings from the moment of conception until birth.

(4) "Conception" means the contact of spermatozoan with the ovum.

E.(1) Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one nor more than ten years and shall

be fined not less than ten thousand dollars nor more than one hundred thousand dollars.

(2) This penalty shall not apply to the female who has an abortion.

Section 3. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

Section 4. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided in Article III, Section 18 of the Constitution of Louisiana.

/s/ J. Dimos
SPEAKER OF THE HOUSE OF REPRESENTATIVES

/s/ S. B. Nunez
PRESIDENT OF THE SENATE

GOVERNOR OF THE STATE OF LOUISIANA

VETOED: June 14, 1991
/s/ Buddy Roemer

ACT 26

Regular Session, 1991

HOUSE BILL NO. 112

BY REPRESENTATIVE SAM THERIOT, SENATOR BARES, REPRESENTATIVES DIMOS, LANCASTER, LABORDE, SITTIG, HIGGINBOTHAM, ACCARDO, ACKAL, DIEZ, DONELON, GLOVER, GUIDRY, HAIK, HERRING, LEBLANC, LEMOINE, MARTIN, STELLY, AND STINE AND SENATORS MCPHERSON, PICARD, CRAIN, SAUNDERS, BRINKHAUS, AND POSTON

AN ACT

To amend and reenact R.S. 14:87, relative to abortion; to define and prohibit abortions; to provide for exceptions; to provide for penalties; and to provide for related matters.

ORIGINATED

IN THE

House of Representatives

[Original Page Material Continued On Next Page]

GOVERNOR'S OFFICE

JUN 06 1991
TIME 3:30 PM
RECEIVED GMV

RECEIVED
BY SECRETARY OF
STATE

JUN 19 1991

W. Fox McKeithen
Secretary of State

JUNE 18 1991
76 yeas
25 nays

Passed subsequent to
Gubernatorial veto.

ALFRED W. SPEER
Clerk, House of
Representatives

/s/ Alfred W. Spear
Clerk of the House of
Representatives

Passed in the Senate
by a vote of
29 yeas and 9 nays

Finally passed
notwithstanding the
Governors veto
Michael S. Baer, III
Secretary of the Senate

APPENDIX F

States That Treat The Killing of an Unborn Child as Homicide

Nine States define (by statute) the killing of an unborn child as a form of homicide, regardless of the stage of pregnancy:

Arizona:	Ariz. Rev. Stat. § 13-1103(A)(5) (West 1989) (manslaughter)
California:	Cal. Pen. Code, § 187(a) (1988) (murder) (limited by judicial decision to viability, *see People v. Smith*, 59 Cal. App.3d 751, 129 Cal. Rptr. 498 (1976))
Illinois:	Ill. Rev. Stat., ch. 38, ¶¶ 9-1.2, 9-2.1, 9-3.2 (1991) (murder, manslaughter)
Indiana:	Ind. Code Ann., § 35-42-1-6 (Burns 1985) (feticide)
Louisiana:	La. Stat. Ann., §§ 14:2(7), 14:32.5-14:32.8 (West 1986 & 1992 Supp.) (feticide)
Minnesota:	Minn. Stat. Ann., §§ 609.266, 609.2661-609.2665, 609.268(1) (1987 & 1992 Supp.) (murder, manslaughter)
New Mexico:	N.M. Ann. Stat., § 66-8-101.1 (1987) (vehicular homicide), *see Reese v. State*, 106 N.M. 498, 504-05, 745 P.2d 1146, 1152-53 (1987) (Stowers, J., dissenting) ("[p]regnant women and their unborn fetuses are protected by [this section], which extends the scope of the vehicular homicide statute . . . to vehicular injuries resulting in miscarriage or stillbirth")

North Dakota: N.D. Cent. Code, §§ 12.1-17.1-01 to 12.1-17-04 (1991 Supp.) (murder, manslaughter)

Utah: Utah Code Ann., § 76-5-201 *et seq.* (1990 & 1992 Supp.) (any form of homicide)

Six States define (by statute) the killing of an unborn child after quickening as a form of homicide:

Florida: Fla. Stat. Ann., § 782.09 (West 1992) (manslaughter)

Georgia: Off. Code Geo. Ann., § 16-5-80 (1992) (feticide)

Michigan: Mich. Comp. Laws Ann., § 750.322 (West 1968) (manslaughter) (limited by judicial decision to viability, *see Larkin v. Cahalan*, 389 Mich. 533, 208 N.W.2d 176 (1973))

Mississippi: Miss. Code Ann., § 97-3-37 (1972) (manslaughter)

Oklahoma: Okal. Stat. Ann., tit. 21, § 713 (West 1983) (manslaughter)

Washington: Wash. Rev. Code Ann., § 9A.32.060(1)(b) (1986) (manslaughter)

Five states define (by statute or case law) the killing of an unborn child after viability as a form of homicide:

Iowa: Iowa Code Ann., § 707.7 (West 1979) (feticide)

Mass.: *Commonwealth v. Cass*, 392 Mass. 799, 467 N.E.2d 1324 (1984) (vehicular homicide)

Commonwealth v. Lawrence, 404 Mass. 378, 383-84, 536 N.E.2d 571, 575-76 (1989) (involuntary manslaughter)

S.C.: *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984) (homicide)

Tennessee: Tenn. Code Ann., § 39-13-214 (Michie 1991) (criminal homicide)

Rhode Island: R.I. Gen. Laws, § 11-23-5 (Michie 1981) (manslaughter)

One State defines (by statute) the killing of an unborn child after the twenty-fourth week of pregnancy as a form of homicide:

N.Y.: N.Y. Pen. Law, § 125.00 (McKinney's 1987) (homicide)

Three States define (by statute) as criminal assaults attacks on pregnant women causing miscarriage or still-birth:

Arkansas: Ark. Code Ann., § 5-13-201(A)(5) (1991 Supp.)

New Mexico: N.M. Stat. Ann., § 30-3-7 (1978)

Wyoming: Wyo. Stat., § 6-2-502(a)(iv) (Supp. 1988)

Three States define (by statute) nonfatal attacks on an unborn child as criminal offenses:

Illinois: Ill. Rev. Stat., ch 38, ¶¶ 12-3.2, 12-4.4 (1991)

Minnesota: Minn. Stat. Ann., §§ 609.266, 609.267, 609.2671, 609.2672, 609.268(2)

North Dakota: N.D. Cent. Code, §§ 12.1-17.1-01, 12.1-17.1-05, 12.1-17.1-06

The foregoing statutes have been upheld as constitutional in the following decisions:

California:	*People v. Apodaca*, 78 Cal.App.2d 279, 486, 142 Cal. Rptr. 830, 835 (1978)
	People v. Henderson, 225 Cal.App.3d 1129, 1157-58, 275 Cal. Rptr. 837, 853-54 (1990)
	People v. Bunyard, 45 Cal.3d 1189, 1237-41, 249 Cal. Rptr. 71, 103-06, 756 P.2d 795, 827-30 (1988)
Georgia:	*Brinkley v. State*, 253 Geo. 541, 322 S.E.2d 49 (1984)
	Smith v. Newsome, 815 F.2d 1386 (11th Cir. 1987)
Illinois:	*People v. Ford*, 221 Ill. App. 3d 354, 366-72, 581 N.E.2d 1189, 1197-1202 (1991)
	People v. Campos, 227 Ill. App. 3d 434, 451-52, 592 N.E.2d 83, 97 (1992)
Minnesota:	*State v. Merrill*, 450 N.W.2d 318 (Minn. 1990)
	State v. Bauer, 471 N.W.2d 363, 365-66 (Minn. App. 1991)

(4) (2)

Nos. 92-1066 & 92-1157

Supreme Court, U.S.
FILED
JAN 14 1993
THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

EDWIN W. EDWARDS, GOVERNOR OF THE STATE OF LOUISIANA, et al,
Petitioners

v.

SOJOURNER T., et al,
Respondents

and

HARRY CONNICK, SR., DISTRICT ATTORNEY FOR THE PARISH OF ORLEANS, et al,
Petitioners

v.

DR. IFEANYI CHARLES OKPALOBI,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF RESPONDENT, DR. IFEANYI CHARLES OKALOBI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Sidney Mayer Bach
Counsel of Record
Bach & Wasserman
6th Floor - Lakeway II
3850 North Causeway Boulevard
Metairie, Louisiana 70002
(504) 836-7300

Counsel for Respondent
Dr. Ifeanyi Charles Okpalobi

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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QUESTIONS PRESENTED

1. Are there compelling constitutional reasons for the Court to re-visit *Roe v. Wade* and its most recent progeny, *Planned Parenthood v. Casey*?

2. Is access to an abortion a right, privilege or guarantee that can be legitimately extrapolated from the Constitution?

3, If not, is Louisiana's anti-abortion criminal statute constitutionally flawed or legally defective in any other respects?

STATUTORY AND CONSTITUTIONAL PROVISIONS

The challenged legislation is Act 26 of the 1991 Regular Session of the Louisiana Legislature relative to abortion. The text appears as "Appendix D" at p. A-19 of the Petition filed herein on behalf of Edwin W. Edwards, Governor of the State of Louisiana and Richard P. Ieyoub, Attorney General of the State of Louisiana (the "Edwards Petition").

The relevant provisions of the Constitution of the United States applicable to the issues presented are:

A. Amendment X, and

B. Amendment XIV, the "due process" clause.

The relevant provision of the Louisiana Constitution of 1974 is Article I, Section 5 which specifically guarantees a "right of privacy" to all persons.

STATEMENT OF THE CASE

Except for the conclusions of law asserted in footnote 2 at p. 3 of the Edwards Petition, and the present tense of the assertion at p. 5 thereof that "Plaintiff Sojourner T. is pregnant," Respondent adopts by reference Petitioner's Statement of the Case.

SUMMARY OF THE ARGUMENT

There are at least two basic arguments on the issue of whether to grant or deny a writ of certiorari in this case.

1. *AGAINST*

Since just recently within the past year the Justices of this Court have labored and wrestled mightily with the abortion issue, it would appear unlikely that the Court will now either re-align itself and/or issue new and different pronouncements than those so extensively expressed and forcefully asserted in *Planned Parenthood v. Casey,* 505 U.S. ____, 112 S.Ct 2791, 120 L.Ed.2d 674 (1992). Thus, realistic expectations, coupled with the concept of "judicial economy," suggest that the Court will choose not to revisit *Roe v. Wade,* 410 U.S. 113, 93 S.Ct 705, 35 L.Ed.2d 147 (1973) and its progeny at this time.

2. *FOR*

Since we look to the Supreme Court for constitutional interpretation and guidance, the Chief Justice's uncontradicted acknowledgment in *Casey, supra,* as to "the confused state of this Court's abortion jurisprudence"[1] weighs strongly in favor of granting review at this time because of the multitude of uncertainties that still abound on the subject. All yearn for the issue to be resolved with a greater degree of certainty and within the constitutional framework of our republican form of government.

ARGUMENT

Because the *Casey* decision is so fresh in the Court's jurisprudence (June 29, 1992), any expectations that the several Justices will change their respective views and/or re-align themselves on the core constitutional issues

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[1] 112 S.Ct 2791 (1992) at 2855
120 L.Ed.2d 674 at 759

presented would now appear to be unrealistic. Unless such a presumption is unwarranted, it would appear to be in the best interests of judicial economy not to further agitate the issue at this time by the granting of a writ of certiorari in this case.

However, if there is even the slightest chance that some reconsideration of the fundamental underlying issue of constitutional construction could be forthcoming at this time, we would then earnestly contend as follows:

The District Court and the Court of Appeals below acknowledged their constitutional obligation to follow and apply this Court's prior pronouncements on the abortion issue as enunciated in *Roe v. Wade* and its progeny.

However, with the Louisiana litigants now at the Court's front door, this case assumes a greater and more compelling constitutional dimension. At this level, it presents the Court with an opportunity to effectively address a fundamental overriding constitutional issue which could well overshadow the various parties' legitimate, heartfelt and forcefully articulated interests in the national debate on abortion. This case, without reservation, squarely raises the fundamental issue of federalism, the resolution of which, at this juncture in our Nation's constitutional history, could have a lodestar influence upon American constitutional construction well into the 21st Century.

This case challenges the Court to candidly confront and decisively resolve the issue of whether the Constitution provides a privacy right of such breadth and scope as to pre-empt, with or without limitation, all state-legislated prohibitions against the act of abortion. The plurality in *Casey, supra*, seems to suggest that access to abortion is

not an "absolute" constitutional right, but rather a "conditional" one with sprinklings of legitimate state interests in the regulation of the activity. This compromise approach may well have been formulated with the best and most honorable of intentions, but its potential for creating and perpetuating confusion and uncertainty does not judicially or practically serve the citizenry well.

The issue to be resolved here really isn't Louisiana's abortion statute; for whether the Court chooses to grant or to deny review in this case, that statute is legally doomed. Its demise and ultimate legal burial will result from any one of the following:

i. denial of the request for writ of certiorari in this case,

ii. the unconstitutionally-elusive vagueness of the various exception provisions of this criminal statute which then causes the statute to outlaw all abortions,

iii. the application of the 1974 Louisiana Constitution's clear, absolute and specific guarantee of the "right to privacy":

> "Every person shall be secure in his person ... against unreasonable invasions of privacy." *Louisiana Constitution of 1974,* Article I, Section 5.

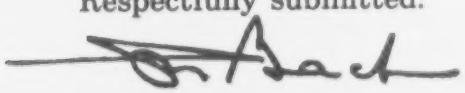
The petitioners here urge consideration of a facial challenge to the statute. But before engaging in that exercise, the Court should first determine whether, with the dawn of the 21st Century now approaching, it is willing to directly confront and decisively resolve the vital

constitutional issue of federalism raised by this case, i.e., whether, through judicial construction, the Constitution should be expanded to questionably permissive reaches for the purpose of resolving issues which the American people, under their republican form of government, are entitled and capable of resolving, within recognized constitutional limitations, through their respective elected state and/or federal legislative representatives.

CONCLUSION

If the Court is ready and willing to address that important and fundamental issue, then respondent would have no opposition to the granting of the writ of certiorari requested by petitioners in this case. Otherwise, the request for writ should be denied.

Respectfully submitted:



Sidney Mayer Bach
Counsel of Record
Bach & Wasserman
6th Floor - Lakeway II
3850 North Causeway Boulevard
Metairie, La. 70002
(504) 836-7300

Counsel for Respondent
Dr. Ifeanyi Charles Okpalobi

Nos. 92-1066 & 92-1157

Supreme Court, U.S.
FILED
FEB 4 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EDWIN EDWARDS and RICHARD P. IEYOUB,

Petitioners,

—v.—

SOJOURNER T., *et al.*,

Respondents.

HARRY CONNICK,

Petitioner,

—v.—

SOJOURNER T., *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

WILLIAM E. RITTENBERG
127 Camp Street
New Orleans, LA 70130
(504) 568-1112

JANET BENSHOOF
(Counsel of Record)
SIMON HELLER
ELLEN K. GOETZ
LENORA M. LAPIDUS
The Center for Reproductive Law & Policy
120 Wall Street
New York, NY 10005
(212) 514-5534

Attorneys for Respondents

QUESTION PRESENTED

Whether Act 26 of the 1991 Louisiana Legislature, banning virtually all abortions and many commonly used methods of birth control, is unconstitutional on its face under this Court's decision in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992)?

PARTIES TO THE PROCEEDING

Plaintiffs-Appellees below and Respondents herein are Sojourner T., Jane and Ida B., on behalf of themselves and all other similarly situated; James DeGueurce, M.D., Calvin Jackson, M.D., and Pamela Branning, M.D., on behalf of themselves and all others similarly situated, and their patients; Hope Medical Group for Women; Delta Women's Clinic West; Causeway Medical Suite; Emilia Bellone, M.S.W., on behalf of herself and her clients; Reverend Kathleen Korb and Rabbi Michael Matuson, on behalf of themselves and their congregants; and Dr. Ifeanyi Charles Okpalobi.*

The Defendants-Appellants below and Petitioners in the case at bar are Edwin Edwards, as Governor of Louisiana; Richard P. Ieyoub, as Attorney General of Louisiana; and Harry Connick, as District Attorney for the Parish of Orleans.

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* Dr. Okpalobi is separately represented by Sidney Bach in this Court, and has filed a separate Brief in Opposition to Certiorari.

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Respondents Sojourner T., et al., oppose the Petitions for a Writ of Certiorari filed on December 18, 1992, and December 21, 1992, by the Governor and Attorney General of Louisiana, and the District Attorney of Orleans Parish, respectively. The Petitions seek review of a decision of the United States Court of Appeals for the Fifth Circuit holding Act 26 of the 1991 Louisiana Legislature, which would ban virtually all abortions in the State, unconstitutional under this Court's decision in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

COUNTERSTATEMENT OF THE CASE

Beginning immediately after this Court's decision in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), Louisiana began to take steps "to enact abortion legislation reminiscent of the dark ages." *Id.* at 521 (Opinion of Rehnquist, C.J.) (plurality opinion). Within one week of this Court's decision in *Webster*, petitioner Connick filed a motion pursuant to Fed. R. Civ. P. 60(b)(5) to lift an injunction against Louisiana's pre-*Roe* criminal statute banning abortion. *See Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990) (three-judge court) (pre-*Roe* law repealed by implication). Then, in its 1990 session, the Louisiana Legislature passed a bill banning virtually all abortions in the state. The bill was vetoed by then Governor Buddy Roemer.

Finally, on June 18, 1991, over the veto of Governor Roemer, the Louisiana Legislature enacted House Bill No. 112 as Act 26 ("the Act"), prohibiting virtually all abortions in Louisiana under penalty of one to ten years imprisonment and a fine of $10,000 to $100,000. *See* *A-

25-26.[2] Only abortions performed under the following narrow circumstances are "not . . . unlawful":

(1) "to preserve the life or health of the unborn child or to remove a dead unborn child"; or

(2) "for the express purpose of saving the life of the mother."

A-20. In addition, "within thirteen weeks of conception," A-21, an abortion may be performed:

(3) where the pregnancy is the "result of rape as defined in [La. Rev. Stat. Ann.] §§ 14:42, 14:42.1, or 14:43," and the rape victim obtains "a physical examination and/or treatment from a physician other than the physician who is to terminate the pregnancy within five days of the rape to determine whether she was pregnant prior to the rape," or "within five days of the removal of [an] incapacity" that prevents such an examination, and the "rape victim reports the rape to law enforcement officials"; or

(4) where the pregnancy "is the result of incest as defined in [La. Rev. Stat. Ann. §] 14:78, provided the crime is reported to law enforcement officials."

A-20-21. Abortion is defined as:

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[2] Citations to the petition by Governor Edwards and Attorney General Ieyoub are in the form "Pet. at __" and citations to its appendix are in the form "A-__"; citations to the petition of District Attorney Connick are in the form "*Pet. at __" and citations to its appendix are in the form "*A-__." Where possible, citations are given to the appendix to the former. Citations to the appendix to this Brief in Opposition are in the form "__a."

> [T]he performance of any of the following acts, with the specific intent of terminating a pregnancy:
>
> (a) Administering or prescribing any drug, potion, medicine, or any other substance to a female; or
>
> (b) Using any instrument or external force whatsoever on a female.

A-20. The Act, however, does not define "pregnancy." Instead, the operative term throughout the legislation -- indeed, throughout Louisiana law[3] -- is "conception." Conception is defined as "the contact of spermatozoan with the ovum," A-22; "unborn child" is defined as "the unborn

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[3] In 1981, the Louisiana legislature expressed its intent that the laws of Louisiana should protect fetal life from the moment of conception:

> The Legislature does solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State.

La. Rev. Stat. Ann. § 40:1299.35.0 (West Supp. 1992). A companion section, La. Rev. Stat. Ann. § 40:1299.35.1(1) (West Supp. 1992), most recently amended in 1981, specifically defines abortion as "the deliberate termination of a human pregnancy after fertilization of a female ovum . . . ." Other Louisiana statutes, not related directly to abortion, also assign rights beginning at conception or fertilization. For example, Louisiana's law regulating the legal status and uses of human embryos defines a human embryo as "an in vitro fertilized human ovum . . . composed of one or more living cells . . . ." La. Rev. Stat. Ann. § 9:121 (West 1991). *See also* La. Civ. Code Ann. art. 26 (West Supp. 1992) ("An unborn child shall be considered as a natural person for whatever relates to its interests from the moment of conception.")

offspring of human beings from the moment of *conception* until birth," *id.* (emphasis added); and abortions in cases of rape and incest must be performed "within thirteen weeks of *conception*," A-21 (emphasis added). Because, unlike much other restrictive abortion legislation,[4] the Act penalizes termination of pregnancy that occurs after "conception" but before implantation of the fertilized ovum, the Act prohibits many commonly used methods of birth control, including the intrauterine device, the morning-after pill, and the low-dose pill, all of which sometimes act to prevent implantation of a fertilized ovum.[5]

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[4] The abortion ban statutes enacted recently in Utah and Guam both exclude pre-implantation terminations of "pregnancy" from their scope. The Guam statute defines abortion as "the purposeful termination of a human pregnancy after implantation of a fertilized ovum by any person including the pregnant woman herself with an intention other than to produce a live birth or to remove a dead unborn fetus." 9 Guam Code Ann. § 31.20. Similarly, Utah's statute defines abortion as "the intentional termination or attempted termination of human pregnancy after implantation of a fertilized ovum . . . " Utah Code Ann. § 76-7-301(1) (Supp. 1992). Even the Texas statute struck down by this Court in *Roe* effectively excluded pre-implantation terminations of pregnancy: "By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused." *Roe v. Wade*, 410 U.S. 113, 117 n.1 (1973) (quoting Texas Penal Code Art. 1191).

[5] The Act's legislative history also supports its application to certain types of birth control. For example, in his June 14, 1991, veto statement, Governor Roemer wrote:

> As House Bill 112 was going through the legislative process, I attempted to offer amendments which would provide meaningful exceptions to the general restrictions on abortion. In the House Chamber, my amendments were not offered because the House voted to close off debate peremptorily. I attempted then to have my amendments introduced in the

(continued...)

This case was filed on June 18, 1991. On June 20, 1991, Judge Duplantier of the United States District Court for the Eastern District of Louisiana directed the parties to file cross-motions for judgment on the pleadings, thereby eliminating any opportunity for meaningful factual development in the case. On August 7, 1991, two days after the motions were filed, the district court held the Act unconstitutional on its face while simultaneously bemoaning the continuing validity of the central holding of *Roe v. Wade*. A-14-16. The next day, petitioners filed their notice of appeal.

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[5](...continued)

> Senate. I met with the author of the bill, Representative Theriot, and the Senate sponsor, Senator Bares, and asked if they would accept my amendments to the bill. They declined. I then asked that amendments be offered on the Senate floor, but they were not accepted by the Senate. Without these amendments the bill is too harsh and restrictive.

Appendix A at 1a (*Statement of Governor Buddy Roemer Regarding House Bill No. 112)*, at 1. One amendment offered by the Governor:

> would have clearly defined pregnancy and clearly allowed such accepted medical procedures as termination of a tubal pregnancy and insertion of an intrauterine device.

Id. at 2. The Legislature's rejection of this amendment supports a finding that the Legislature intended to reach the insertion of intrauterine devices and, indeed, any other type of birth control that might operate to prevent implantation of a fertilized egg. The opinion of Louisiana Attorney General Guste to the contrary, *see* A-24-30, is, under Louisiana law, "at most persuasive." *Mitchell v. Tillman*, 469 So. 2d 363, 365 n.3 (La. Ct. App. 1985) (citations omitted); *see also Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 395 (1988). Indeed, because it is a self-serving opinion issued in the midst of this litigation, even its persuasive value is extremely limited.

The Court of Appeals unanimously affirmed the decision of the district court on September 22, 1992, holding squarely that this Court's decision in *Casey* invalidated the Act. A-5. Judge Garza concurred specially, lamenting this Court's refusal in *Casey* to overturn *Roe* completely, while properly recognizing that he was bound by *Casey*. A-8-10.

REASONS FOR DENYING THE WRIT

Petitioners make no claim that the decision of the Court of Appeals is "in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort." Sup. Ct. R. 10.1(a). Indeed, the decision of the court below is in harmony with each of the two courts -- one federal court of appeals and one state supreme court -- that have addressed the constitutionality of a ban on abortion following this Court's decision in *Casey*. *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir.), *cert. denied*, 113 S. Ct. 633 (1992); *In re Initiative Petition No. 349*, 838 P.2d 1 (Okla. 1992), *cert. denied*, 61 U.S.L.W. 3480 (U.S. Jan. 11, 1993) (No. 92-784).

Instead, the only Rule 10 factor petitioners appear to invoke is that the court below "decided a federal question in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10(c). They argue that the Act must be upheld as facially constitutional under *United States v. Salerno*, 481 U.S. 739 (1987), because it may have "some" constitutional applications, particularly as to abortions performed for race or sex selection or to "harvest" fetal parts, as to post-viability abortions, and as to abortions

performed by non-physicians. *See* Pet. at 11; *Pet. at 8.[6] Thus, petitioners claim that the decision of the court below conflicts with *Salerno* and related cases, despite this Court's most recent holding in *Casey* that a ban on pre-viability abortions is unconstitutional regardless of whether the ban contains exceptions. 112 S. Ct. at 2804, 2821.

Contrary to petitioners' contention, the decision below in no way conflicts with this Court's decisions; rather, it is required by clear, controlling precedent of this Court. Moreover, petitioners have misconstrued and misrepresented the holdings of *Salerno* and related cases in an attempt to eviscerate all constitutional protection for the constitutional right to choose abortion. Both within its abortion jurisprudence and in other areas of constitutional law, this Court has not hesitated to invalidate statutes on their face when it is clear that fundamental constitutional rights will be severely burdened if the statutes are allowed to go into effect.

At bottom, then, the petitions in this case are no more than a request that this Court overrule its recent decision in *Casey*. *See* Pet. at 11-29. Petitioners advance no persuasive reason for this Court to reconsider its decision in

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[6] These arguments are virtually identical to those made by the Governor of Guam in his unsuccessful petition for certiorari to review Guam's ban on abortion. *See* Petition for Certiorari in *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, No. 92-104, at 8-15.

Casey to reaffirm *Roe*'s central holding,[7] and the petition must therefore be denied.

I. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THIS COURT'S PRIOR RULINGS IN ABORTION AND CONTRACEPTION CASES.

Petitioners have failed to show that the decision below conflicts with any of this Court's prior abortion or contraception cases. In fact, the outcome in the case below was mandated by this Court's decision last Term in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992), in which this Court clearly and unequivocally "retained and once again reaffirmed" the "essential holding of *Roe v. Wade*," 410 U.S. 113 (1973); *see also id.* at 2821 ("[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from

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[7] Petitioners argue, *inter alia*, that this Court's holding in *Casey* that *stare decisis* supports reaffirmation of *Roe* is incorrect, and that *Roe* incorrectly described the state interest in prohibiting abortion as an interest in "potential life." Pet. at 12-17. Each of these arguments were carefully considered and rejected in *Casey*. 112 S. Ct. at 2808-16, 2817; *id.* at 2839 (Stevens, J., concurring in part and dissenting in part). In addition, Petitioners argue that "scientific knowledge available since *Roe v. Wade*" justifies the Act. Pet. at 17. However, developments in scientific knowledge since *Roe* have not removed the underpinnings of this Court's holding in *Roe* that "those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus," 410 U.S. at 159, on when human life begins. *See* Brief of 167 Distinguished Scientists and Physicians, including 11 Nobel Laureates, as *Amici Curiae* at 3-7, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (No. 88-605). Petitioners' argument that Louisiana's civil law tradition uniquely gives Louisiana a compelling interest in fetal life from the moment of conception was presented to this Court and implicitly rejected in *Guste v. Weeks*, 429 U.S. 1056 (1977).

making the ultimate decision to terminate her pregnancy before viability") (Opinion of O'Connor, Kennedy, and Souter, JJ.). That the Act is unconstitutional under *Roe*, as reaffirmed in *Casey*, is beyond doubt.[8]

Although this Court has relied on *Salerno* in several recent abortion cases, each has involved speculative challenges to statutory provisions in the absence of factual support. These cases have held only that facial challenges cannot prevail when based on an implausible statutory interpretation or "worst-case analysis that may never occur." *See, e.g., Ohio v. Akron Ctr. for Reproductive Health*, 110 S. Ct. 2972, 2981 (1990) (*Akron II*).[9] Such a

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[8] Because the court below decided this case on other grounds, it did not reach the question of whether the Act violated the strictures of *Griswold v. Connecticut*, 381 U.S. 479 (1965), and its progeny. *See* A-7 n.5; *see also* A-5-6 (despite general rule favoring decision on statutory rather than constitutional grounds, case would be decided under "clear holding of *Casey*."). Since *Griswold*, however, it has been a settled point of law that "the constitutionally protected right of privacy extends to an individual's liberty to make choices regarding contraception . . . . [R]egulations imposing a burden on [this right] may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685-86 (1977); *see also Griswold*, 381 U.S. at 497 (Goldberg, J., concurring); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). In *Casey*, this Court reiterated that it had "no doubt as to the correctness of those decisions." 112 S. Ct. at 2807. Because it imposes a criminal ban on contraceptives that work after fertilization, but before implantation, the Act also clearly fails to pass constitutional muster under these cases.

[9] In *Akron II*, this Court rejected an argument that a judicial bypass procedure for a parental notice statute was not sufficiently expeditious. By interpreting the number of "days" required for the bypass to mean "business days," and reasoning that the bypass procedure could occur at a time of the year when it would encompass three Saturdays, three

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test -- which only bars plaintiffs from bringing remote or speculative claims -- is not equivalent to Petitioners' proposed test, which would require plaintiffs to demonstrate that there is *no* constitutional application of a challenged statute. But no implausible or speculative interpretation of the Act is required to see that the Act is in direct contravention of *Roe* and *Casey*.[10]

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[9](...continued)
Sundays, and two legal holidays, the lower courts had calculated that the procedure could take up to 22 calendar days. *Id.* at 2980. This Court held, however, that "the mere possibility that the procedure may require up to twenty-two days in a rare case is plainly insufficient to invalidate the statute on its face." *Id.* at 2981. *See also Webster*, 492 U.S. at 523 (O'Connor, J., concurring) (rejecting challenge to Missouri's ban on the use of public facilities in the performance of abortions, which was based on the contention that the statute could be applied "against private hospitals using public water and sewage lines, or against private hospitals leasing state-owned equipment or state land"). Likewise, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), does not establish that the *Salerno* facial challenge test applies to all abortion regulations. There, the facial challenge to restrictions on abortion counseling in federally funded programs the government had violated no constitutional right since "the Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected." *Id.* at 1776. Here, the Act unquestionably violates the constitutional rights of women established in *Roe* and *Casey*.

[10] The Act prohibits virtually all abortions, both before and after viability. Indeed, even as to post-viability procedures, the Act is unconstitutionally restrictive because it permits only those procedures performed "for the express purpose of saving the life of the mother," A-20, and contains no exception whatsoever for the health of the woman. Both *Roe* itself, 410 U.S. at 164-65, and *Casey* require post-viability restrictions to "contain[] exceptions for pregnancies which endanger a woman's life *or health*." *Casey*, 112 S. Ct. at 2804 (emphasis added). Further, the Act conflicts with an existing Louisiana statute authorizing discipline of physicians for "[p]erforming, or assisting in the performance of, or procuring or abetting in procuring an (continued...)

Moreover, *Casey* itself rejects the application of petitioners' version of *Salerno* to abortion cases. In striking down Pennsylvania's husband notice requirement on its face,[11] the *Casey* Court wrote:

> Respondents attempt to avoid the conclusion that § 3209 [the husband notification requirement] is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions. . . . Respondents argue that . . . the statute affects fewer than one percent of women seeking abortions. For this reason, it is asserted, the statute cannot be invalid on its face. *We disagree with respondents' basic method of analysis.*
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> The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on

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[10](...continued)
abortion or termination of pregnancy during the third trimester of pregnancy or after viability of the fetus, unless the physician determines that such abortion or termination of pregnancy is necessary, in his best medical judgment, in order to save the life *or health* of the pregnant woman and/or of the fetus (unborn child)." La. Rev. Stat. Ann. § 37:1285(A)(8)(a) (emphasis added) (West 1988).

[11] While the Court upheld a number of other challenged provisions of the Pennsylvania Act, it did so based on the record before it. *See, e.g.*, 112 S. Ct. at 2826; *id.* at 2824; *id.* at 2833; *see also id.* at 2880 (Scalia, J., dissenting). The case has been remanded for further proceedings and plaintiffs have moved to reopen the record so that the district court may make the further factual determinations necessitated under the new undue burden standard established by this Court. *Planned Parenthood v. Casey*, 978 F.2d 74, 78 (3d Cir. 1992).

> those whose conduct it affects. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

112 S. Ct. at 2829 (citation omitted) (emphasis added). The critical inquiry, therefore, is whether "in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[12] *Id.* at 2830. It is clear beyond peradventure that the Act will prohibit not only a "large fraction" of abortions, but virtually all of them.

The position urged by Petitioners runs counter not only to the test adopted by a majority of Justices in *Casey*, but also to this Court's decisions in a number of facial challenges to abortion statutes both before and after *Webster*, when the shift away from the strict scrutiny standard of review for abortion cases first began.[13] *See*,

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[12] By contrast, the dissenting Justices would have followed the approach urged by Petitioners herein and required plaintiffs in abortion cases to "show that no set of circumstances exists under which the [provision] would be valid." *See id.* at 2870 (Rehnquist, C.J., concurring in part and dissenting in part) (quoting *Akron II*, 110 S. Ct. at 2980-81); *see also id.* at 2870 n.2 (complaining that the joint opinion "appears to ignore this point in concluding that the spousal notice provision imposes an undue burden on the abortion decision."); *id.* at 2854 (Blackmun, J., concurring in part and dissenting in part) (the Chief Justice's test would be an "insurmountable requirement for facial challenges").

[13] Petitioners' analysis also conflicts with this Court's decisions concerning state regulation of contraceptives. For example, in *Griswold*, recognizing that a ban on the use of contraceptives would "achieve its goals" by having a "maximum destructive impact upon [the marital] relationship," *Griswold*, 381 U.S. at 485, the Court invalidated

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e.g., *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983) (*Akron I*); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). For example, in *Hodgson*, this Court struck down on its face the statutory provision requiring a minor to notify both parents before obtaining an abortion without allowing her the option of using a judicial bypass procedure. In so doing, the Court focused on the families of those minors who would not have notified both parents in the absence of the statute -- i.e., the "group for whom the law is a restriction." *Casey*, 112 S. Ct. at 2829. In particular, the Court examined the deleterious effects of this requirement on those families in which "the parent notified by the child would not notify the other parent." *Hodgson*, 110 S. Ct. at 2945; *see also id.* at 2966 (Kennedy, J., concurring in part and dissenting in part) (majority reached its result by finding that "law is unnecessary when notice produces favorable results . . . and irrational in all of the instances when it produces unfavorable results"). Thus, the Court invalidated the provision even though there was no proof that the burdens on families would be severe in *every* case. By contrast, the dissenting Justices would have upheld the two-parent notice requirement, even though "[l]ike all laws of general application, the Minnesota statute cannot produce perfect results in every situation to which it applies . . . ." *Id.* at 2969 (Kennedy, J., dissenting); *see also id.* at 2950 (O'Connor, J., concurring) (invalidating two-parent notice statute because of "its broad sweep and its failure to serve the purposes asserted by the State in too many cases").

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[13](...continued)
the ban because it "swe[pt] unnecessarily broadly and . . . invade[d] the area of protected freedoms." *Id.* (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)); *see also id.* at 498 (Goldberg, J., concurring).

Likewise, in *Akron I*, in invalidating a second trimester hospitalization requirement, the Court relied heavily on the fact that early second trimester abortions could be safely performed in an outpatient clinic. 462 U.S. at 437. Akron had argued, much like petitioners do now, that these examples of unconstitutional applications should not invalidate the requirement. *Id.* at 438. Nonetheless, the Court found that by preventing the performance of some abortions in an appropriate non-hospital setting, Akron "imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure." *Id.*

Petitioners' request amounts to a plea that this Court undertake a radical rereading of plaintiffs' burden in facial constitutional challenges. If this Court adopts Petitioners' test, it must overrule each of the abortion cases noted above. An "as-applied" determination must then be made on a case-by-case basis, as those few doctors who are not chilled by the criminal and civil sanctions that may be imposed on them are charged under these laws.[14] *Casey* does not impose this regime on the right to choose abortion.

II. CONTRARY TO PETITIONERS' ARGUMENT, FACIAL CHALLENGES ARE ROUTINELY PERMITTED OUTSIDE THE CONTEXT OF THE FIRST AMENDMENT.

This Court's contraception and abortion cases are not exceptional; indeed, this Court has permitted facial challenges in a wide range of cases outside the First

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[14] Thus, Petitioner Connick explicitly advocates that *Casey* "be read" to require only that states allow the affirmative defense of "non-viability" to a general prohibition of abortion. *Pet. at 10-14. This is not a "reading" of *Casey*, but an overruling of it.

Amendment context. Under Petitioners' proposed standard, if a statute violates the Constitution in 99 out of 100 applications, the one constitutional application would force a court to ignore the 99 unconstitutional applications and uphold the statute. This, of course, cannot be, and is not, the law.[15]

The Court has not hesitated to strike down a statute on its face even when the statute could be applied constitutionally in some circumstances. *See, e.g.*, *Kraft Gen. Foods v. Iowa Dep't of Revenue*, 112 S. Ct. 2365 (1992); *Barnard v. Thorstenn*, 489 U.S. 546 (1989); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494 (1976); *United States Dep't of Agric. v. Murry*, 413 U.S. 508 (1973); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Particularly where fundamental rights are burdened, the Court has regularly invalidated laws that operate unconstitutionally as applied to some people but not others. *See Zablocki*, 434 U.S. 374 (marriage); *Stanley*, 405 U.S. 645 (parental rights); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (voting); *Aptheker*, 378 U.S. 500 (right to travel); *Pierce*, 268 U.S.

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[15] If it were, a statute authorizing the police to search *any* person, building or vehicle at *any* time, would be constitutional on its face because it could be constitutionally applied in some instances. Moreover, when dismissing a facial challenge, a court would be forced to identify at least one constitutional application of the statute, in essence rendering an advisory opinion on which applications of the statute are constitutional. It is not the role of the federal judiciary to identify minute constitutional applications of a statute, like the Act, that imposes a blanket prohibition on conduct generally protected by the Constitution.

510 (child rearing and education); *Moore*, 431 U.S. 494 (family choices).

This Court has struck down statutes in facial challenges even when the laws could be applied constitutionally to the very parties bringing the challenge. In *Aptheker*, the Court struck down a federal law prohibiting any member of a Communist organization from applying for a passport on the ground that the Act infringed the fundamental right to travel and thereby violated due process. The Court struck down the law on its face despite the claim that it could be applied constitutionally to the appellants themselves, who were found to be top-ranking Communist party leaders. *See* 378 U.S. at 525 (Clark, J., dissenting).

Furthermore, restrictions that infringe a fundamental right have been struck down even when the restrictions did not, in fact, prevent the party challenging the provision from exercising such a right. *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (durational residency requirement for voting unconstitutionally infringes right to travel even though it did not deter plaintiff from moving); *Shapiro v. Thompson*, 394 U.S. 618, 650 (1969) (durational residency requirement for receipt of welfare benefits unconstitutional even though, in operation, few welfare recipients, and none of the litigants, were actually deterred from travel) (Warren, C.J., dissenting).

In adjudicating facial challenges, the Court has used an overbreadth analysis, similar to that used in the First Amendment context, to strike down provisions that impermissibly restrict constitutionally protected activity along with activity that may permissibly be restricted:

> It is a familiar and basic principle . . . that "a governmental purpose to control or prevent

> activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

Aptheker, 378 U.S. at 508 (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)). While recognizing that the right to travel was closely related to First Amendment guarantees, the Court in *Aptheker* made clear that a law infringing a fundamental right, such as the right to travel, would be subject to an overbreadth analysis as applied in First Amendment cases. *See id.* at 516 ("Since this case involves a personal liberty protected by the Bill of Rights, we believe that the proper approach to legislation curtailing that liberty must be that adopted by this Court in *NAACP v. Button*, 371 U.S. 415, and *Thornhill v. Alabama*, 310 U.S. 88.") Thus, overbreadth analysis has not been strictly limited to the First Amendment context. *See also* Henry P. Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277, 285 (1984) ("A rule that proscribes significantly more conduct than is justified by the permissible governmental end may not be applied to the litigant, even though the litigant's own conduct could be prohibited. This is not only in the first amendment area, but whenever significant means-ends congruence is required by the applicable substantive constitutional law.").[16]

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[16] *Salerno* itself is in agreement with these cases. In *Salerno*, certain defendants challenged the provision of the Bail Reform Act of 1984 that allows for pre-trial detention based on a finding of future dangerousness. However, the defendants never "claimed that the Act is unconstitutional because of the way it was applied to the particular facts of their case." 481 U.S. at 745 n.3. In recognition of the general rules of standing, *Salerno* merely declined to invalidate the Act because it "might operate unconstitutionally under some conceivable set of circumstances" not applicable to the defendants in that case. *Id.* at 745.

Where a fundamental constitutional right is at stake, the statute must be narrowly tailored to serve legitimate state interests. "[T]he question is whether the [provisions] sweep too broadly." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644 (1974); *see also Aptheker*, 378 U.S. at 514 (the section "sweeps too widely and too discriminately across the liberty guaranteed in the Fifth Amendment; *Dunn*, 405 U.S. at 343 ("In pursuing [an] important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision' . . . and must be 'tailored' to serve their legitimate objectives.") (citations omitted). This analysis applies with full force to statutes restricting abortion. *Roe*, 410 U.S. at 155.

Moreover, where the critical analytic question concerns the *purpose* of a statute,[17] facial challenges must be permitted. "A court's finding of improper purpose behind a statute is appropriately determined by the statute on its face . . . ." *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987). It is clear that the purpose of the Louisiana legislature in enacting this statute was to prohibit *all* abortions, except in a very few limited exceptions, and petitioners cannot now assert a purpose to restrict only post-viability abortions. Where the purpose of a statute is contested as unconstitutional, parties must be given the opportunity to challenge the law before it is put into effect,

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[17] In *Casey*, the Court made clear that the "undue burden" standard requires courts to inquire into the purpose of abortion laws: "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the *purpose or effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 112 S. Ct. at 2820 (joint opinion) (emphasis added).

for the relevant determination does not depend upon the effects of the law, as applied, in operation.[18]

In striking down statutes as facially invalid, the Court has repeatedly rejected Petitioners' proposed rule that a law cannot be invalidated on its face, outside the First Amendment context, unless it can be shown that the law has no constitutional applications. Often, the Court has done so over a dissent that relied on the rule proposed by petitioners. *See, e.g.*, *Zablocki*, 434 U.S. at 409 (Rehnquist, J., dissenting); *Aptheker*, 378 U.S. at 521

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[18] Moreover, the Louisiana ban cannot be upheld against a facial challenge based on the claim that the ban can be read to apply constitutionally to post-viability abortions, to abortions performed for sex selection or to "harvest" fetal parts, or to abortions performed by non-physicians. The plain language of the Act clearly prohibits all abortions with only a few limited exceptions. This Court cannot, in an effort to find the law constitutional, rewrite it to apply only to certain abortions. While "a court should strive to interpret a statute in a way that will avoid an unconstitutional construction . . . it is 'not a license for the judiciary to rewrite language enacted by the legislature.'" *Chapman v. United States*, 111 S. Ct. 1919, 1927 (1991) (quoting *United States v. Monsanto*, 491 U.S. 600, 611 (1989)); *see also Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("we will not rewrite a state law to conform it to constitutional requirements"); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1975) ("we are without power to remedy the defects by giving the ordinance constitutionally precise content"); *Scales v. United States*, 367 U.S. 203, 211 (1961) ("Although [the] Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . ."). Nor can this Court sever the ban to uphold it as applied to those abortions which could constitutionally be prohibited and ignore it as to those abortions, which cannot be banned under *Casey* and *Roe*. "We are not able to reject a part [of the statute] which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional . . . from that which is not." *United States v. Reese*, 92 U.S. 214, 221 (1876).

(Clark, J., dissenting). However, the majority of the Court has declined to adopt this restrictive formulation.

Just last term in *Kraft*, 112 S.Ct. 2365, the Court invalidated a state income tax law that allowed a deduction for dividends received from domestic subsidiaries but not for dividends received from foreign subsidiaries, holding that the statute facially discriminated against foreign commerce in violation of the Foreign Commerce Clause. The Court struck down the statute despite the fact that it would not discriminate against foreign commerce in all applications. In his dissent, Chief Justice Rehnquist, joined by Justice Blackmun, relied on *Salerno* to argue that the statute should not be struck down on its face because it could be applied constitutionally in some cases: for example, the tax scheme would have no effect on foreign commerce when applied to a foreign subsidiary that is incorporated in a foreign country but engages in no foreign activity. 112 S. Ct. at 2372 (Rehnquist, C.J., dissenting). Nevertheless, the majority invalidated the law on its face.

CONCLUSION

Casey and *Roe* clearly establish that bans on abortion are unconstitutional on their face. Acceptance of Petitioners' request that this Court bar facial challenges to all abortion restrictions, including bans on abortion, would eviscerate the holdings of those cases and subject women to arbitrary and dangerous state laws. Further, a reversal of this Court's holdings in *Casey* would threaten the legitimacy of the Court and allow Louisiana and other states to return the dark ages. Therefore, the petitions for writs of certiorari must be denied.

Respectfully submitted,

WILLIAM E. RITTENBERG
127 Camp Street
New Orleans, LA 70130
(504) 568-1112

JANET BENSHOOF
(Counsel of Record)
SIMON HELLER
ELLEN K. GOETZ
LENORA M. LAPIDUS
The Center for Reproductive Law & Policy
120 Wall Street
New York, NY 10005
(212) 514-5534

Attorneys for Respondents

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APPENDIX

Statement of Governor Buddy Roemer
Regarding House Bill No. 112

House Bill 112 criminalizes abortions, imposes a minimum mandatory penalty of one year at hard labor and imposes a minimum a mandatory fine of $10,000 on any person convicted of performing an abortion. The maximum penalty is 10 years at hard labor and a $100,000 fine. Self-abortion is allowed but professional, medical abortions are not. The bill purports to grant exceptions for the life of the mother, for rape and for incest.

First, I applaud the legislature in its efforts to restrict abortions. The open window for abortions must be closed in order to protect the life of the unborn, but meaningful exceptions must be drawn in order to protect the life and rights of the woman involved.

As House Bill 112 was going through the legislative process, I attempted to offer amendments which would provide meaningful exceptions to the general restrictions on abortion. In the House Chamber, my amendments were not offered because the House voted to close off debate peremptorily. I attempted then to have my amendments introduced in the Senate. I met with the author of the bill, Representative Theriot, and the Senate sponsor, Senator Bares, and asked if they would accept my amendments to the bill. They declined. I then asked that amendments be offered on the Senate floor, but they were not accepted by the Senate. Without these amendments the bill is too harsh and restrictive.

Just as I said a year ago, the bill fails to provide for adequate protection for rape victims. The 5 day requirement for a medical examination and the 7 day

requirement for reporting to law enforcement are unworkable and unrealistic in many cases. The lives and rights of women in Louisiana demand balanced and thoughtful consideration. Forcing a rape victim to report to law enforcement officials and seek medical treatment, all within a week of the crime, is an onerous burden. Under this bill, ignorance of the law would force a woman to bear and give birth it a child conceived in brutality if she is unable to meet this artificial and narrow 7 day test. Is this a meaningful exception? I think not.

While prompt reporting may be ideal, it ignores reality: rape is the most underreported violent crime in our nation, with less than 20% of all rapes ever being reported to law enforcement. Much of this refusal to report stems from fear, humiliation and a reluctance to go through a public trial. The requirement that a woman have only 7 days to decide about reporting to law enforcement is a harsh burden.

While a woman, ideally, should go to her doctor as quickly as possible after a rape, many do not. The reporting periods I have requested (30 days for the medical examination and 45 days for law enforcement) are not arbitrary, but rather are based on simply human biology--within 30 days of intercourse a woman's body begins to change if she is pregnant. At that point a woman is likely to seek medical help on her own.

[2] The proponents of this bill also maintain that any expansion of the reporting period will "open the door" for women to lie and doctors to conspire with women to obtain abortions. They ignore the fact that rape is a terrible, pervasive reality in this country with the Los Angeles Commission on Assaults Against Women reporting that approximately 1 in 3 women in America will be raped.

More importantly, they ignore the basic dignity and trustworthiness of women as well as the honor and professional ethics of the doctors with whom these women consult. Women need more time to make a real, meaningful choice in a traumatic atmosphere.

The second amendment which I submitted would have clearly defined pregnancy and clearly allowed such accepted medical procedures as termination of a tubal pregnancy and insertion of an intrauterine device. I offered this amendment at the request of many obstetricians and gynecologists in this state. As the bill stands now, its definitions and terminology are so vague that doctors will be unwilling to risk their liberty and their professional careers by terminating any form of pregnancy at all.

Finally, I offered a carefully drawn amendment which would permit abortions in cases where the fetus is profoundly deformed, and the deformity is incompatible with life itself. The practice of medicine has advanced to such a degree that such deformities can, and generally are, detected early in the pregnancy. The decision on whether to carry such a fetus to full term should be up to the woman and her family--not the legislature.

House Bill 112 dishonors women, shows great mistrust of doctors and their professional judgment, and unduly burdens the traumatized victims of rape.

For these reasons I will veto House bill 112.